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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

RALPH MARTIN,

Plaintiff and Respondent,

v.

JAMES KNAUSS,

Defendant and Appellant.

A124134

(City & County of San Francisco
Super. Ct. No. 468271)

Ralph Martin filed a complaint against James Knauss for his alleged breach of a settlement agreement, fraud, and breach of the implied covenant of good faith and fair dealing. Knauss filed an anti-SLAPP motion to strike the causes of action for fraud and breach of the implied covenant. The trial court granted the motion to strike the fraud claim, but denied it as to the claim for breach of the implied covenant. Knauss appeals, and argues that his conduct that was alleged to breach the implied covenant of good faith and fair dealing was protected by the litigation privilege. We conclude that whether or not Knauss's actions may have been protected by the litigation privilege, Knauss has failed to show the implied covenant claim arose from first amendment speech or petitioning activity that is protected by the anti-SLAPP statute. We affirm the trial court's order.

FACTUAL AND PROCEDURAL BACKGROUND

Martin originally sued Knauss for violations of the Fair Employment and Housing Act, assault, battery, intentional infliction of emotional distress, defamation, and failure to pay wages. The parties agreed to a settlement that required Knauss to pay Martin \$11,000, and both parties to dismiss their claims and cross-claims with prejudice. After Knauss failed to make the \$11,000 payment by the date specified in the settlement agreement, Martin filed the complaint in this case for breach of contract. Martin's first amended complaint added claims for fraud and breach of the implied covenant of good faith and fair dealing. The fraud claim alleged that Knauss agreed to the settlement in bad faith, and never intended to perform under the agreement. The claim for breach of the covenant of good faith and fair dealing alleged that "Defendant interfered with Plaintiff's right to receive the benefits under the agreement because he intentionally contacted a third party to encourage that third party to scuttle any benefit Plaintiff would have received from the settlement agreement." As we shall explain, this allegation refers to Knauss's efforts to encourage a third party to sue Martin.

Knauss moved to strike the causes of action for fraud and breach of the implied covenant under the anti-SLAPP statute, and argued the conduct alleged in Martin's complaint was "entirely protected under the California litigation privilege" Knauss supported his anti-SLAPP motion with copies of several documents, including a complaint that was filed in a separate lawsuit by Larry Summers against Martin alleging breach of a \$16,500 promissory note and fraud, a lawsuit that remains pending according to Knauss's opening brief in this court;¹ Knauss's proposed cross-complaint in this action, which the trial court dismissed by demurrer, that sought to interplead the funds Knauss owed Martin so that they could be paid to Summers; Knauss's deposition

¹ In his suit against Martin, Summers was represented by Herman Franck, who also represents Knauss in this appeal.

testimony stating he encouraged Summers to speak to attorney Herman Franck, Knauss's attorney in this case, to "[s]ee if he had a valid claim to recover his debt from this [*sic*] settlement monies"; and Martin's deposition testimony stating he owed Summers money, and would pay it when he received the settlement from Knauss.²

In addition to those documents, Knauss also supported his anti-SLAPP motion to strike with his own declaration. Knauss declared that he formerly employed Martin as an instructor at San Francisco Barber College, when Martin borrowed money from Knauss and Summers (then a student at the Barber College). Knauss said Martin never repaid his debt, but instead filed "bogus claims" against him. After Knauss agreed to pay Martin \$11,000 to settle the lawsuit, he was concerned Martin would not repay Summers. Knauss declared: "In light of my concern, and as part of my overall litigation process in combating Ralph Martin[']s problem of being a surreal [*sic*] borrower and defaulter on loans, I took it upon myself to make arrangements to see that Larry Summers was paid the \$11,000 I owed Ralph Martin."

Martin opposed Knauss's anti-SLAPP motion, and requested attorney fees. Martin argued that Knauss's actions were not undertaken to advance his own constitutionally protected right to petition for redress of grievances, and that, in any event, "at the time [Knauss] made his statements, there is no evidence at all there was any litigation even considered by [Summers]." Martin also contended that Knauss's strategy to encourage a third party to sue Martin so that Knauss could avoid paying Martin what he owed under the settlement agreement, was unlawful and not constitutionally protected activity because it violated the covenant of good faith and fair dealing implied in the settlement agreement. Moreover, even if the court were to find Knauss met his initial

² Knauss also submitted Summers's declaration regarding his own dispute with Martin.

burden, Martin maintained there was ample evidence to show he could prevail on the challenged causes of action.

When it heard the motion to strike, the court explained it intended to grant the motion as to the fraud claim because “the gravamen of that is the defendant’s promises made during settlement negotiations in litigation and . . . those statements intended to induce settlement . . . are protected conduct . . . and absolutely privilege[d] so that the plaintiff cannot prevail with respect to that claim.” But the court was “inclined to deny the motion [on the implied covenant] cause of action . . . [because] [i]t is premised on the defendant, subsequent to concluding the prior litigation, having taken steps to encourage a third party not in the litigation to assert that third party’s rights, and I don’t think that that is within the protected sphere of the anti-SLAPP statute. To the extent that it were, the plaintiff has shown at least some likelihood of [the] possibility of prevailing sufficient to meet the standard.” During the hearing, the court told defense counsel, “all your client is assertedly liable for in this case is what he urged a third party to do, not what he did himself in terms of litigation,” and further observed, “when one with a generalized sense of justice tries to get other people to dishonor—to interfere with the performance of contractual obligations, arguably there’s a claim.”

The court granted the anti-SLAPP motion challenging the fraud claim, and denied the motion on the claim for breach of the covenant of good faith and fair dealing “because Defendant has not shown post-litigation cont[ra]cts are protected activity.” No attorney fees were awarded. Knauss timely appealed.³ Because no brief has been filed by respondent after written notice by the clerk of this court, we will decide the appeal on

³ Knauss’s motion to stay the proceedings in the trial court pending appeal was denied. According to his opening brief, “the case proceeded to a court trial as to the First Cause of Action only. The court found in favor of Plaintiff in the amount of \$11,000. There is no formal Judgment, thus, none is included herein.”

the record, the opening brief and appellant's oral argument. (Cal. Rules of Court, rule 8.220(c), (d).)

DISCUSSION

“A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056.) Section 425.16, subdivision (b)(1) provides: “A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.” Section 425.16, subdivision (e) defines an “ ‘act in furtherance of a person's right of petition or free speech under the United States or California Constitution in connection with a public issue,’ ” to include statements made before, or in connection with an issue under consideration by, a judicial proceeding.

Determination of an anti-SLAPP motion requires a two-step process. “First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim. Under [Code of Civil Procedure] section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’ ” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) An order granting or denying an anti-SLAPP motion is appealable under

sections 425.16, subdivision (i), and 904.1, subdivision (a)(13). We review the trial court's ruling de novo. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325.)

The focus of the anti-SLAPP statute is on “the defendant’s *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning.” (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92; accord, *Birkner v. Lam* (2007) 156 Cal.App.4th 275, 281.) “If the core injury-producing conduct upon which the plaintiff’s claim is premised does not rest on protected speech or petitioning activity, collateral or incidental allusions to protected activity will not trigger application of the anti-SLAPP statute.” (*Hylton v. Rogozienski, Inc.* (Sept. 23, 2009, D053371) ____ Cal.App.4th ____ [2009 WL 3019692, 3].)

Knauss contends his “conduct in getting Larry Summers to sue Ralph Martin is protected by the litigation privilege pursuant to Civil Code Section 47(b).” In relevant part, Civil Code section 47 provides: “A privileged publication or broadcast is one made: [¶] . . . [¶] (b) In any . . . (2) judicial proceeding” But it is not enough for Knauss to simply show his conduct was privileged. Courts sometimes look to the litigation privilege as an aid in determining whether a given communication falls within the scope of Code of Civil Procedure section 425.16, subdivision (e). (See *Flatley v. Mauro, supra*, 39 Cal.4th at pp. 322-323.) The litigation privilege may also be “relevant to the second step in the anti-SLAPP analysis in that it may present a substantive defense a plaintiff must overcome to demonstrate a probability of prevailing.” (*Id.* at p. 323.) But the protection afforded by the litigation privilege and that afforded by the anti-SLAPP law are not coextensive. Our Supreme Court has rejected the notion that just “because some forms of illegal litigation-related activity may be privileged under the litigation privilege, that activity is necessarily protected under the anti-SLAPP statute.” (*Id.* at p. 325.)

In light of this judicial rejection of “the broad conclusion that conduct deemed communicative for purposes of Civil Code section 47 automatically qualifies as constitutionally protected speech under [Code of Civil Procedure] section 425.16,” we

need not determine the validity of Knauss's claim that his encouragement of Martin was protected by Civil Code section 47. (*Garretson v. Post* (2007) 156 Cal.App.4th 1508, 1517; see also *Flatley v. Mauro, supra*, 39 Cal.4th at p. 325 ["Civil Code section 47 does not operate as a limitation on the scope of the anti-SLAPP statute"]; *Century 21 Chamberlain & Associates v. Haberman* (2009) 173 Cal.App.4th 1, 10 ["statements protected by the litigation privilege are not necessarily protected by the anti-SLAPP statute"].) Knauss fails to meet his burden to show that the challenged cause of action for breach of the implied covenant of good faith and fair dealing arose from constitutional activity protected by the anti-SLAPP statute. (See Code Civ. Proc., § 425.16, subd. (b)(1) [providing for a special motion to strike "[a] cause of action against a person arising from any act of that person in furtherance of the person's right of petition"]; see also *Garretson v. Post, supra*, at p. 1519 [defendant must "affirmatively show that [his or] her conduct qualifies as constitutionally protected activity under [Code of Civil Procedure] section 425.16"].)

"Here, the gist of plaintiff's complaint is not that defendant did something wrong by acts committed during the course of the underlying . . . action, but rather that defendant did something wrong by breaching the settlement agreement after the underlying action had been concluded." (*Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.* (2008) 164 Cal.App.4th 1108, 1118.) Moreover, as revealed by his own statements, Knauss did not act in support of his own right to petition, but rather to encourage a third party (Summers) to sue Martin so that Knauss could avoid his obligation to pay Martin the sum specified in the settlement. This is the conduct that Martin contends violated the implied covenant of good faith and fair dealing. (See *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 ["There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement"].)

“[D]efendant’s entering into the settlement agreement during the pendency of the [underlying] case was indeed a protected activity, but defendant’s subsequent alleged breach of the settlement agreement after the [underlying] case was concluded is not protected activity because it cannot be said that the alleged breaching activity was undertaken by defendant in furtherance of defendant’s right of petition or free speech, as those rights are defined in [Code of Civil Procedure] section 425.16. Thus, the instant [cause of action] is based on alleged conduct by defendant that is *not* protected activity.” (*Applied Business Software, Inc. v. Pacific Mortgage Exchange, Inc.*, *supra*, 164 Cal.App.4th at p. 1118; see also *Martinez v. Metabolife Internat., Inc.* (2003) 113 Cal.App.4th 181, 188 [“it is the *principal thrust* or *gravamen* of the plaintiff’s cause of action that determines whether the anti-SLAPP statute applies . . . [and] collateral allusions to protected activity should not subject the cause of action to the anti-SLAPP statute”].) Knauss’s motion to strike Martin’s cause of action for breach of the implied covenant of good faith and fair dealing was properly denied.⁴

DISPOSITION

The order of the trial court is affirmed.

Siggins, J.

We concur:

McGuinness, P. J.

Jenkins, J.

⁴ We therefore need not reach the issue of whether Martin established a prima facie case of success on the merits. (See *Hylton v. Rogozienski, Inc.*, *supra*, ___ Cal.App.4th at p. ___ [2009 WL 3019692 at p. 6]; *Haneline Pacific Properties, LLC v. May* (2008) 167 Cal.App.4th 311, 320.)